

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
United States Court of Appeals
For the District of Columbia,

No. 7702.

663

JOSEPH JACKSON,
Appellant,

vs.

MABEL YOUNG, *et al.*,
Appellee.

BRIEF FOR APPELLANT.

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United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1940.

JOSEPH JACKSON,
Appellant,

vs.

MABEL YOUNG, *et al.*,
Appellee.

} No. _____.

BRIEF FOR APPELLANT.

This case is before this Court by reason of an appeal taken from the findings of fact, conclusions of law, and judgment entered after hearing in the District Court of the United States for the District of Columbia.

Statement of Facts.

The appellant was the plaintiff in the lower court and is referred to herein as the plaintiff, and the defendant is the appellee and is referred to herein as the defendant. This case involves a suit filed in two counts, one count in the removal of a cloud from premises known as 1622 Vermont Avenue, Northwest, as to the one-half interest of the plaintiff, Joseph Jackson, and a second count in ejectment alleging specifically that the defendant, Mabel Young, mortgaged the entire premises as her property in 1936 praying for mesne profits and judgment for recovery of the premises.

The plaintiff alleged that he was the son of James Jackson and Alice Dudley Jackson, James Jackson being the only brother of the full blood of George F. Jackson, acknowledged predecessor in title and owner of 1622 Ver-

mont Avenue, Northwest, George F. Jackson having died intestate, unmarried and without issue, leaving as the only heirs and next of kin, the plaintiff, Joseph Jackson, and the defendant, Mable Young.

The defendant, Mable Young, contended that she was sole heir at law and next of kin of George F. Jackson; that she took possession immediately after his death on June 12, 1917; that title passed according to the Probate Court records to the defendant, Mable Young; secondly, that she claimed to have been in possession continuously, exclusively, and hostile for over twenty-two years; third, the defendant pleaded laches; fourth, that the plaintiff was not the son of James Jackson and that Joseph Jackson was not a nephew of George F. Jackson. In addition to the aforestated defenses, the defendant filed a counter-claim praying for *quia timet* relief.

The facts proven by the plaintiff were as follows: Catherine Colder and Edgar Johnson knew Joseph Jackson when he was a boy; they lived in the vicinity of Pleasant Court where the plaintiff lived in his boyhood; they knew James Jackson and Alice Jackson and the plaintiff, Joseph Jackson, lived with them and was treated and regarded in the community as their son (Record, pp. 30-31). That the plaintiff introduced letters written by his mother, in the handwriting of the defendant, in which he was recognized as her son (Record, pp. 45, 48); and further letters were introduced into evidence signed Washington Jackson, your uncle (Record, pp. 46, 47). The school records showed the plaintiff as Joseph Dudley, parent or guardian, James Jackson (Record, p. 50); at the time of the trial, the plaintiff had been known as a Jackson for over sixty years.

The only facts proven by the defendant were that the plaintiff was omitted from the petitions for letters of administration and letters of administration de bonis non which were offered over objection of attorney for the plaintiff to prove lack of relationship. The defendant

further proved that the plaintiff had never requested to occupy the premises or been in possession of the premises, but to the contrary she had been in possession for over twenty years, improved, and paid taxes upon the premises (Record, pp. 51, 52). Upon the aforesated and reported evidence, the Court made the findings of facts (Record, pp. 22, 23, 24), conclusions of law (Record, p. 25) and judgment (Record, p. 26).

The appellant relied upon the allegations set forth in the amended complaint that he was the son of Alice Dudley Jackson and James Jackson, being recognized by James Jackson as his son (Record, pp. 28, 29, 30, 31), and the evidence that Joseph Jackson carried the family name, was reared in the Jackson family, recognized and treated as his son by other members of the family and James Jackson, together with the written exhibits.

The learned Justice ignored all objections of counsel that the Probate Court could not pass title to real estate, being a court without jurisdiction over land in the District of Columbia where there is no deficiency of personal property to liquidate the debts of the estate, that the probate records were irrelevant and immaterial, that there was no proof that Joseph Jackson had an interest in the administration proceedings of George F. Jackson, that he was personally served or notified of the proceedings. That Probate Court by ex parte petitions could not and did not determine relationship. That the omission of Joseph Jackson from petitions for letters of administration did not prove lack of relationship. That mere possession, payment of taxes and improvements was not sufficient to show adverse holding. That proof of an ouster was necessary, that the Court had to consider the action as an action at law, not an action in equity, and the Court could not apply the doctrine of laches, but would have to apply the statute of limitations commencing at the time of hostile, adverse holding, but the Court ruled against the aforesated objections notwithstanding (Record, pp. 59, 60).

Assignment of Errors.

The Court erred as follows:

1. In entering a judgment for the defendant.
2. In not ruling to the contrary.
3. In overruling plaintiff's motion for a new trial.
4. By improperly admitting and considering the ex parte petition of Frances Frelinghysen and Washington N. Jackson in Administration Cause No. 24,450 for the purpose of negating the relationship of Joseph Jackson to James Jackson and the ancestor, George F. Jackson.
5. In finding as a matter of fact that the title to the property passed according to the probate records to the defendant, Mable Young, by virtue of administration proceedings of George F. Jackson.
6. In ruling that an ouster by some positive act was not necessary to commence the statute of limitation to run against a tenant in common who inherited from a common source.
7. In finding that Mable Young's hostile, adverse, and exclusive possession of the premises commenced at the death of the ancestor, George F. Jackson.
8. In ruling that the evidence was insufficient to prove that James Jackson was the father of the plaintiff, Joseph Jackson.
9. In ruling that the lapse of time between the death of George F. Jackson and the commencement of the suit was a circumstance from which he could infer that the plaintiff's claim was fraudulent without evidence to sustain him in his finding.
10. In ignoring the testimony of the witnesses that they had known Joseph Jackson when he was a boy between the ages of 9 and 11 and that he lived in the home of James Jackson and that he was considered the son of James Jackson and Alice Dudley.

11. In finding that it was necessary for the plaintiff to prove either he was born before or after the inception and continuation of a common law marriage.

12. In finding that Joseph Jackson is the son of Alice Jackson and not the son of James Jackson.

13. In failing and refusing to consider admitted letters written by Washington N. Jackson, in which he designated himself as uncle of the plaintiff, Joseph Jackson.

14. In finding that the evidence of acknowledgment by James Jackson of Joseph Jackson was insufficient.

15. In finding that Joseph Jackson was the son of Alice Jackson by another man.

16. In failing to consider the letters written by the defendant, Mable Young, in behalf of her mother requesting that he come to see her, signed Alice Jackson, your mother.

17. In refusing to consider the testimony of the handwriting expert, Ira Gullickson, who proved that the letters were written by the defendant, Mable Young.

18. In finding that Mable Young was the only surviving child of James Jackson.

19. In finding that the defendant became seized of the record title as of June 12, 1917, the day and date of the death of George F. Jackson as sole heir.

20. In construction and interpretation of the case of *Fulkerson vs. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, which he considered a basis for the admission of the ex parte affidavits of Frances Frelinghysen and Washington N. Jackson, to negative relationship.

21. In construction and interpretation of Section 957 of the District of Columbia Code.

22. In ruling that the burden of proof was upon the plaintiff to prove legitimacy.

23. In ruling that the cogency of the presumption of legitimacy has no force and effect in legitimatizing Joseph Jackson, notwithstanding proof of the marriage of James Jackson and Alice Dudley in the absence of proof of his pre-marital birth.

24. In ruling that an omission and silence in an instrument supposedly setting forth relationship is positive proof of lack of relationship.

25. In failing to consider the present action as an action in ejectment at law.

26. In ruling that the statute of limitation commenced in 1917 at time of the death of George F. Jackson.

27. In ruling that it was necessary to prove time when common law marriage commenced.

28. In ruling that proof of common law marriage after the birth of Joseph Jackson, the fact that he carried the family name, lived in the household and was recognized by neighbors as the child of James Jackson and Alice Jackson was not sufficient to constitute an acknowledgment.

The Issues:

1. Is evidence of marriage of admitted mother to a man who recognizes by acts and conduct her child as his, the child carrying the family name, and being reared as a member of the family sufficient recognition of the child to entitle him to inherit?

2. In the absence of proof that a child was born before or after a marriage of the mother to the putative father, can the court infer without evidence that the child was born before the marriage?

3. Is it necessary to prove that a child was born before or after a marriage, when the child is recognized by the father, before the child can inherit?

4. Can the court make a finding without evidence that Joseph Jackson was the son of an illicit relationship of the plaintiff's mother without evidence to support such a finding?

5. Is a confession of ignorance of facts and omissions sufficient evidence to overcome positive affirmative evidence?

6. Is the burden of proof of an affirmative defense of illegitimacy upon the defendant?

7. Is the burden borne by omissions and denial of knowledge?

8. Does cogency of the presumption of legitimacy operate where there is no proof as to whether a child was born before or after the marriage?

9. Would the time of the commencement of a common law marriage affect whether a child born before or after the marriage would be capable of inheriting from the father if the child were recognized by the father?

10. Did the court err in construing and applying Section 957 of the District of Columbia Code of Laws?

11. Does real property by virtue of the intestacy of the owner with sufficient personal property to liquidate his debts pass according to records of probate court?

12. Does probate court have jurisdiction in the absence of devise and insolvency have the right to control the devolution of real property in the District of Columbia?

13. Do ex parte affidavits filed in probate proceedings omitting names of relatives have any probative force to prove lack of relationship of those names omitted?

14. Did the court commit error in admitting administration petitions to prove lack of relationship?

15. Can the court ignore all competent relevant testimony and decide case on unfounded inferences?

16. Did the court err in ruling that an ouster by some positive act was not necessary to commence the statute of limitations to run against a tenant in common notwithstanding that both the plaintiff and the defendant inherited from a common ancestor?

17. Does exclusive possession, payment of taxes, and making improvements commence statute of limitation to run against a co-tenant?

18. Can the court find as a matter of fact from mere possession in 1917 that adverse holding commenced at the time of the taking of possession?

19. Did Mabel Young become seized of record title as of June 12, 1917?

20. Did the court err in construction and application of *Fulkerson vs. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780?

21. Did the court err in construction and application of *Henderson vs. Mann*, 47 Appeals, D. C. 174?

22. Should the court have decided the case as a case at law?

Argument of Law.

(Issues 1 to 10, inclusive)

The appellant contends that where there is proof of a common law marriage between a child's mother and a putative father, the child being held out in the community as their child, receiving the treatment of a legitimate offspring, carrying the family name for over sixty years and being further recognized by other relatives is sufficient to constitute acknowledgment as required under Section 957 of the District of Columbia Code of Laws.

SECTION 957. Antenuptial Children.—“If any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue

of such marriage and acknowledgment, be legitimated and capable in law of inheriting and transmitting heritable property as if born in wedlock."

We have no case decided on this point in this jurisdiction. Virginia has a similar code provision, which reads as follows:

SECTION 5269. When Marriage Legitimizes Children. "If a man, having had a child or children by a woman shall afterwards intermarry with her, such child or children or their descendants, if recognized by him before or after marriage shall be deemed legitimate."

Hoover vs. Hoover, 131 Va. 522, 105 S. E. 91, 109 S. E. 424.

The court said:

"Marriage is an evidential fact to be considered along with other evidence in determining the fact of recognition but it is so far from being conclusive and the surrounding circumstances may be such as to utterly divest it of all weight whatever as where it is entered into at the point of a pistol. The value of the fact of marriage, therefore, as evidence tending to show recognition must in each case depend upon the circumstances surrounding the attending marriage, so if a man marries a woman *grossement enciente* or shortly after birth of a child the marriage itself would furnish necessary recognition of the child."

See:

Stegall vs. Stegall, 2 Brock. 256 Fed. Case 13351.

McLean vs. McLean, 92 Kan. 326.

In re: Gird, 157 Cal. 534.

In re: Jones, 166 Cal. 108, 135 Pac. 288.

Townsend vs. Meanly, 37 Ind., a 127, 74 N. E. 274.

Tout vs. Woodin, 157 Iowa 518, 137 N. W. 1001.

Morgan vs. Strand, 133 Iowa 299, 110 N. W. 596.

The trend of the courts are toward legitimation and the indulgence of the presumption of legitimacy.

In re: Mathews, 153 N. Y. 443, 44 N. E. 901.
Vreeland vs. Vreeland, 78 N. J., Eq. 256, 79 Atl.
 336.

Stein vs. Stein, 106 S. W. 860, 32 Ky. L. 664.

The evidence in this case is stronger than usual where relationship of a person having been dead for over a period of thirty years is at issue; written declarations by members of the family to be affected is competent proof of relationship especially where the declarant has no interest in making the declaration and no controversy had yet arisen.

See:

Green vs. Normant, 5 Mackey 16 D. C. 80.

The similarity of name can be considered by the court.

Fulkerson vs. Holmes, 117 U. S. 389; 6 Sup. Ct. 780.

The only evidence offered by the defendant who raised the question of illegitimacy was the petitions for letters of administration and the petition for letters of administration de bonis non and the assertion of the defendant that she did not know whether the plaintiff was her brother or not. The court merely upon the omissions and complete failure of affirmative evidence to support their contention of illegitimacy proceeded to bastardize the plaintiff; assumed that the marriage of James Jackson and Alice Dudley had not taken place at the time of the birth of Joseph Jackson; that he was the offspring of another man, although the court reached the conclusion that the plaintiff was the son of Alice Dudley Jackson, the admitted common law wife of James Jackson. The court disregarded all presumptions arising from the relationship of James Jackson and Alice Dudley Jackson and assumed that Joseph Jackson was illegitimate. The position the trial court took was contrary to all indulgencies of

the law toward legitimacy and legitimation. The afore-stated presumption is indulged in for children born before as well as subsequent to the marriage.

Stein vs. Stein (supra).

Improbability will not break the cogency of the presumption of legitimacy, nor will a result of illegitimacy be reached by a balancing of the probabilities.

See:

In re: Sokoloff's Estate, 2 N. Y. Supp. 2nd 602, 166 Misc. 403.

Persons seeking to invalidate a marriage and bastardize children who resulted therefrom must prove every necessary link in the chain of evidence, including negatives and no inference of identity from similarity of names or otherwise can be indulged.

Upon the aforestated argument, we are compelled to answer the issues Nos. 1 to 6 and 10 in the affirmative; 2, 3, 4, 5 and 9 in the negative.

Argument of Law.

(Issues 11 to 22 inclusive)

The court in his finding of facts found that title to the property passed according to the probate records to the defendant, Mable Young, and the conclusions of law that she was the sole heir of George F. Jackson all of said findings on which the court predicated its judgment. There is nothing in the record to support such a finding of fact, conclusion of law, and judgment save the records of Probate Court which the plaintiff contends is not controlling and could not pass title to Mable Young, the defendant, for the following reasons: Probate Court did not have jurisdiction over the real property and could not determine what heirs were entitled to the property; the Probate Court acquires

jurisdiction over real property only when it is devised or the personal assets of the estate are insufficient to pay debts.

See:

Section 117 District of Columbia Code:

“That in addition to the jurisdiction conferred in the preceding section, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained.”

See:

Section 146, District of Columbia Code of Laws:

“The said court shall have plenary authority to administer also the real estate situated in the District of Columbia of decedents so far as may be necessary for the payment of debts and legacies, and to distribute among those entitled thereto any surplus proceeds of any sale of real estate made in the course of such administration, and the bonds hereafter executed of all executors and administrators shall be responsible for the proceeds of sale of all real estate sold by them under the order of the said justice for such purposes of administration: Provided, however, That no such sale shall be made unless the same be required for the purposes of paying debts and such legacies as are chargeable upon the real estate, nor until the auditor of the court shall have ascertained and reported such debts and legacies, the deficiency of personal assets, and the real estate necessary to be sold for the payment of debts and legacies; and such report shall be subject to exception.”

Richardson vs. Daggett, 24 D. C. App. 440, 33 Wash. L. Rep. 24.

Probate Court is without power to determine the question of title and control of the possession of property. The petitions for letters of administration by virtue of their omissions were not proof of lack of relationship; were irrelevant and immaterial to prove lack of relationship.

See:

Welch vs. Lynch, 30 App. D. C. 112.

Judicial proceedings offered in evidence by the defendant in an action in ejectment showing that the plaintiff failed to appear therein as heir at law and next of kin of the parties whose estates were administered are inadmissible to negative claim that the plaintiffs were related to such party.

There was no showing that citations were served upon the plaintiff; that there was a surplus of personality to be divided between the heirs, nor that he had an interest in the proceedings. However, the court ruled that *Fulkerson vs. Holmes* was an authority for the admission of the ex parte affidavits for letters of administration all of to which counsel for the plaintiff objected on the following grounds: *Fulkerson* case has no relevancy to the present case before the court because in the *Fulkerson* case the deed offered in evidence was relevant to the issue before the court concerning and describing the land in question, together with designation of the predecessors in title, no such relevancy was shown in the instant case. The deed was admissible as an ancient document and was operative in conveying the interest of the Youngs.

Fulkerson vs. Holmes (supra).

The court had before it the question of adverse possession of Mable Young, the evidence clearly showing

that the plaintiff never had possession, never requested possession and the only hostile act of Mable Young being the mortgaging of the property in 1936. The plaintiff contends that it was necessary for the tenant in common to oust the cotenant or do some act to bring home to him knowledge of the fact that her holding was hostile to the cotenant. Mable Young and Joseph Jackson inherited from a common ancestor, their titles vested at the same time by virtue of our laws of descent. The rule which prohibits one cotenant from acquiring or asserting adverse title against his cotenant because of the mutual relation of trust and confidence which the law recognizes as existing between them, the rule is applied chiefly to a cotenancy accruing at the same time under a common title.

Parker vs. Sinclair, 61 App. D. C. 219; 59 Fed. 2nd 1033.

McCleskey vs. Bar, 47 Fed. 154.

In the instant case, the general rule which prohibits a cotenant from acquiring or asserting adverse title against his cotenant applies.

Holley vs. Hawley, 39 Vt. 525, 94 Am. Dec. 350.

McClung vs. Ross, 5 Wheat. U. S. 116.

The rule being as aforesaid it was necessary for the defendant, Mable Young, to repudiate the subordination of her possession and the relationship of cotenant at which point the statute of limitation would commence to run against her cotenant as if between strangers.

Zeller's Lessee vs. Eckert, 4 Howard U. S. 289.

Whitings Heirs vs. Taylor Heirs, 8 Dana Ky. 403.

Clay vs. Field, 115 U. S. 260; 6 Sup. Ct. Rep. 36.

Therefore it was essential for the court to rule when Mable Young commenced to hold adverse and hostile to the plaintiff, Joseph Jackson, and by what acts and conduct she repudiated the joint tenancy. The court ruled that it was not necessary to prove an ouster applying the rule as set forth in *Henderson vs. Mann* which plain-

tiff contends has no application to the instant case. In *Henderson vs. Mann*, the defendant was the wife of the ancestor from whom the property descended to the plaintiff who was his child; the wife was not a tenant in common, but a widow having a consummate dower; her oral declaration of telling the child she could not stay in her father's house was sufficient notice that the plaintiff was being ousted and sufficient to commence the statute of limitation to run. In this case the only act of ouster, hostile or adverse, was the mortgaging of the entire premises in 1936.

The learned trial court should have decided the case as a case at law and not as a case in equity, the rule being that the holder of legal title must be in possession of the land when the action is instituted to remove a cloud from the title of property, or to institute claim of adverse possession.

William vs. Paine, 7 App. D. C. 116, 169 U. S. 55, 18 S. Ct. 279.

Marks vs. Main, 15 D. C. App. 559; 4 Mackeys.

The counterclaim of the defendant had to fail on the insufficiency of the proof of ouster.

Wherefore, the plaintiff concludes that issues 11, 12, 13, 15, 17, 18 and 19 should be answered in the negative and issues 14, 16, 20, 21, and 22 should be answered in the affirmative.

CONCLUSION.

It is respectfully submitted that the judgment appealed from should be reversed.

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 OTHO D. BRANSON,
 Attorneys for Appellant.

Appendix.

Code of Law for the District of Columbia.

Chapter One.

Sub-Chapter Three.

Supreme Court.

Section 117.

“That in addition to the jurisdiction conferred in the preceding section, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained.”

Section 146. Sale of Real Estate.

“The said court shall have plenary authority to administer also the real estate situated in the District of Columbia of decedents so far as may be necessary for the payment of debts and legacies, and to distribute among those entitled thereto any surplus proceeds of any sale of real estate made in the course of such administration, and the bonds hereafter executed of all executors and administrators shall be responsible for the proceeds of sale of all real estate sold by them under the order of the said justice for such purposes of administration: Provided, however, That no such sale shall be made unless the same be required for the purposes of paying debts and such legacies as are chargeable upon the real estate, nor until the

auditor of the court shall have ascertained and reported such debts and legacies, the deficiency of personal assets, and the real estate necessary to be sold for the payment of debts and legacies; and such report shall be subject to exception."

Section 957. Antenuptial Children.

"If any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be legitimated and capable in law of inheriting and transmitting heritable property as if born in wedlock."

Code of Law for Virginia.

Chapter

Section 5269. When Marriage Legitimizes Children.

"If a man, having had a child or children by a woman shall afterwards, inter-marry with her such child or children or their descendants, if recognized by him before or after marriage shall be deemed legitimate."

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 28 1940

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United States Court of Appeals
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JOSEPH JACKSON, *Appellant*,
v.
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—
APPELLEE'S BRIEF.
—

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IN THE
United States Court of Appeals
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No. 7702.

JOSEPH JACKSON, *Appellant*,

v.

MABEL YOUNG, ET AL., *Appellee*.

APPELLEE'S BRIEF.

On June 12, 1917, George F. Jackson died owning premises 1622 Vermont Avenue. He was unmarried and died intestate. He left as his sole heir Mabel Young, the appellee, who is the child of his brother of the whole blood James Jackson who died in 1908.

James Jackson's widow Alice Dudley Jackson who was appellee's mother, also survived George.

Besides leaving appellee as his heir, George also left a half sister Frances Freylinghuysen and a half brother Washington N. Jackson and they administered his estate.

Upon George's death appellee took possession of the property and she has occupied it ever since, paid all

the taxes and is the only person who has exercised dominion and control over it since his death. In 1928 she mortgaged the property to erect a brick house thereon in place of the old frame one and in 1936 she again mortgaged the property to build a garage.

On April 19, 1939 the appellant filed an action against appellee and others (which has since been voluntarily dismissed as to all except appellee) in which he claimed and sought to recover a half interest in the said real estate as tenant in common with appellee. He based his claim upon the allegation "that James Jackson, as the result of his marriage with Alice Jackson, had two children who are the sole survivors and heirs of George F. Jackson, the said children being the plaintiff herein, Joseph Jackson, and Mabel Young, nee Mabel Jackson, one of the defendants herein." Later appellant amended his declaration by adding a new count in ejectment in which he alleged "that the plaintiff and defendant Mabel Young are the children of the union of James Jackson and Alice Jackson and that the plaintiff herein was born of that union prior to 1869 and was held out and acknowledged by James Jackson to be the child of James Jackson and Alice Jackson."

In her answer to the original declaration Mabel Young denied that appellant is a child of James Jackson and at the pretrial of the case it was stipulated that her defenses interposed to the original declaration should also stand as her defenses to the amended declaration.

By virtue of the averments of each count of the declaration it became incumbent upon the appellant, in the light of the appellee's answer, to prove the essentials of s. 247, Title 25, p. 364 of the 1929 D. C. Code which provides—

“Antenuptial children.—If any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be legitimated and capable in law of inheriting and transmitting heritable property as if born in wedlock.”

Mabel Young was born August 4, 1892, which accounts for the fact that she knows nothing about the paternity of the appellant who alleges that he was born prior to 1869. Prior to her possession of 1622 Vermont Avenue she never saw nor heard of him. On one occasion when he visited there she heard her mother say to him, “you are Joe Dudley.”

Upon the death of George his half sister Frances Freylinghuysen petitioned the Probate Court for the appointment of an administrator of his estate and informed the Court that appellee was the only child of James Jackson; thereafter Washington N. Jackson filed a similar petition stating the same fact—Frances Freylinghuysen having died prior to the end of the administration year.

Alice Dudley Jackson, widow of James Jackson, died November 16, 1936.

Washington N. Jackson died February 22, 1939.

Frances Freylinghuysen died July 20, 1918.

It was not until the deaths of all of these people that the present suit was filed.

Appellant offered no excuse nor explanation in his original or amended complaint for not asserting his claim of kinship to James Jackson in the lifetime of Alice Dudley Jackson, Washington N. Jackson or Frances Freylinghuysen. If appellant's reason for this was that he did not want to embarrass his mother, that reason disappeared upon her death in 1936 but Washington was then still living. He asserted no claim

of ownership during their lives although George died June 12, 1917—23 years ago—and appellee was in possession claiming and dealing with the property as her own.

SUMMARY OF ARGUMENT.

Appellee's stand is that—

(a) The findings of fact must be accepted as true inasmuch as there is no statement of all the evidence to indicate otherwise.

(b) The appellant did not prove the essentials of s. 247, Title 25 of the 1929 D. C. Code.

(c) The appellant is guilty of laches in having waited to assert his claim until after the deaths of the three persons who had knowledge of his parentage and thereby he deprived appellee of the evidence which was available to her from June 12, 1917 to February 22, 1939, to disprove appellant's present claim of kinship to James Jackson.

(d) Regardless of appellant's kinship to James Jackson, if any, appellee's continuous possession of the property for more than fifteen years prior to the filing of the action is of itself a complete defense.

ARGUMENT.

There being no statement of the whole evidence, the findings of fact must be accepted as true.

The person who actually knew whether appellant is a child of James Jackson was appellee's mother Alice Dudley Jackson who lived until November 16, 1936. Undoubtedly Washington N. Jackson also knew from James Jackson himself whether appellant is James' child. Although Washington lived until February 22,

1939—3 years after Alice Dudley Jackson's death—it was not until after his death that appellant filed the present suit. By this unexplained action appellee is prejudiced and deprived of the benefit of the testimony of her mother Alice Dudley Jackson and her uncle Washington N. Jackson. *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776.

Appellant relies upon letters written by Washington N. Jackson yet he objects to Washington's verified declaration of heirship filed in the Probate Court.

Appellant's difficulty is that he was unable to prove the essentials of s. 247, Chap. 7, Title 25 of the 1929 D. C. Code. And even if appellant is a child of James Jackson, the appellee's proved defense of adverse possession forecloses his recovery. *Henderson v. Mann*, 47 App. D. C. 174; *Parker v. Sinclair*, 61 App. D. C. 219, 59 Fed. (2) 1033; *Elder v. McClaskey*, 70 Fed. 529. See also *Faulks v. Schrider*, Wash. Law Rep. of October 11, 1940.

Upon its face appellant's claim of ownership is barred by laches and the statute of limitations. *Anglo-Columbian Dev. Co. v. Stapleton*, 57 App. D. C. 209, 19 Fed. (2) 683; *Sweet v. Lowry*, 123 Minn. 13, 142 N. W. 882, 47 L. R. A. (N. S.) 451; 1929 D. C. Code, Title 24, Chap. 12, s. 341, p. 339.

It is axiomatic in the law that a plaintiff in ejectment must recover on the strength of his own title and not on the weakness of his adversary's title. *Ches. B. R. Co. v. Wash. P. & C. R. Co.*, 23 App. D. C. 587, 594.

The judgment is right and should be affirmed.

Respectfully submitted,

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